In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1276

JOSEPH R. KAPP, *Petitioner,*

vs.

NATIONAL FOOTBALL LEAGUE, ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Reply Brief in Support of Petition for a Writ of Certiorari

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The essence of NFL's[1] brief in opposition is that its very discussion demonstrates the presence of each of the three questions tendered by our petition but makes no effort to justify or defend the answers the court below gave to those questions. Instead of offering any justification or defense of these errors, it simply recites the facts showing that they were committed.

NFL tenders as reason for denying the writ a claim that the verdict and judgment stand for no more than the proposition that a private antitrust claimant must show not only a defendant's violation of the antitrust law but also impact and injury from the violation (R.B., 2, 12). But the vice of the decision is that it goes far beyond that proposition, which no one contests. The heart

1. We refer to respondents collectively as the "NFL". Respondents' brief will be referred to as "R.B." Emphasis in quotations is added.

of *this* case is that there was impact and damage *here* as a matter of law. The expulsion of a man from his occupation *is* impact; it can be nothing else. A man expelled from his occupation by a *boycott* is damaged in his "business or property". Both courts below agreed that Kapp was so expelled and boycotted. The trial court held that Kapp was "discharge[d]" because of "his refusal to comply with demands that he sign the Standard Player Contract" and that signing would have bound him to "the whole NFL Constitution and By-Laws which, in turn, included the rules herein held to be illegal" (quoted, Pet. 9). The Court of Appeals called what NFL did to Kapp a *"group boycott* of the type condemned as *per se* unlawful" by this Court (quoted, Pet. 12).

NFL would elude the obvious by massaging words and resorting to contentions that Kapp's motives transformed boycott into withdrawal. Kapp, it says, signed the Standard Player Contract but never returned it to the Patriots,[2] and "*withdrew* from the Patriots' training camp *in lieu* of returning the Standard Player Contract and completing his contract arrangements on the NFL's official player-club contract form" (R.B. 3). But Kapp did not *withdraw* from camp; he was *ordered out* of camp and football. As noted in the petition (p. 14) NFL's official statement in its personnel records is that "Kapp was *ordered* to leave the Patriots' 1971 training camp when he refused to sign a Standard Player's Contract". To describe as a "withdrawal" a refusal to succumb to the demand as the only way of avoiding the sanction of being

2. As regards Kapp's signing, the facts are these: Kapp's "memo agreements" with the Patriots, negotiated by Kapp's attorney, were executed in October, 1970 (Pet. 4; agreed, R.B. 2). Three months later, in January 1971, the Patriot's attorney bypassed Kapp's attorney by sending directly to Kapp a draft Standard Player Contract with the request that he sign and return it. Kapp being in the East and his attorney being in California, Kapp telephoned his attorney for advice and was told to sign whatever he had and mail the papers to counsel for his determination of what to do with them. This was done, counsel concluded that the document was not to be accepted, and it was never delivered to the Patriots. (Tr. 624-26, 1382-84, 1247).

"ordered out" is to *concede* the presence in this case of the first question stated in our petition:

> 1. Is it a defense to Sherman Act liability for the boycott that the victim could have avoided the boycott by succumbing to what it sought to coerce him to do?

NFL would deflect attention from the issues by asserting "that the use of *an* official player-club contract form is necessary and essential to the effective functioning of a modern sports league" (R.B. 5). We note the use of the indefinite article "an". This case is not concerned with whether *some* kind of standard contract is permissible. It concerns the particular one Kapp was being pressured to sign, and *both* courts below have concurred that *that* contract was illegal as violating the Sherman Act.[3] The basis on which this case was decided was that, *notwithstanding the illegality,* Kapp could not recover.

In a similar effort to deflect attention, NFL asserts (R.B. 3) that at the time of the events the use of the standard contract form was provided by collective bargaining. Both courts below *rejected* NFL arguments about collective bargaining, the Court of Appeals with the statement: "But the district court found that at the time Kapp was allegedly forced out of professional football, no *collective bargaining agreement was in effect*" (Pet. App., 4; also Pet. App. 34).[4]

We resist the urge to show, in this reply brief, that bland assertions by NFL of supposed fact are not supported by the record references, for those very statements highlight the issues

3. That the particular form of standard player contract was not essential to the operation of "a modern sports league" is demonstrated by the fact that the NFL abandoned that contract following the decision in this case and the *Mackey* case (See Pet. 7).

4. In its summary judgment decision, the district court also held that, even if a collective bargaining agreement had been in effect, it could be no excuse or defense for NFL's conduct (Pet., App. 35, 36), and that same conclusion was reached in *Mackey v. National Football League,* both by the district court, 407 F. Supp. 1000, 1008-10 (D. Minn. 1975), and by the Court of Appeals, 543 F.2d 606, 615-616 (8 Cir. 1976), cert. dismissed, 434 U.S. 801 (1977).

we tender. For example, NFL asserts that "Petitioner [having been ordered out] never returned to the Patriots [who would not let him return unless he signed the illegal contract] and instead embarked upon a movie career" (R.B. 4), which he wished to do "while he was still a public figure" (R.B. 8).[5] The innuendo is that Kapp invited the boycott so that he could pursue a movie career! But that presents—it does not escape—the second question of our petition, namely:

> 2. May a jury be permitted to probe into the victim's motives and hold that there was no "impact" from the boycott, despite his outster from his occupation, on the supposition that he wished to be boycotted as an excuse for quitting? Or must not the court act upon the objective admitted fact that he was being asked to sign an illegal contract and was boycotted because he would not do so?

NFL asserts that Kapp had never before the events of 1971 been injured by application of the illegal rules embodied in the standard form and that there was "no realistic prospect" that he would be injured by those rules in the future because—although voted in 1970 the most valuable player in 1969 (Pet. 4)—he had become a player of "declining abilities" by 1971.[6] Assuming the

5. The record cited for the statement is merely that, having been barred from football, Kapp sought and obtained minor roles in motion pictures and television.

6. The Patriots so hungered for the services of this player "of declining abilities" that it offered to pay a fine to the League for permission to use him (Pet. 8). The Patriots president, Sullivan, considered Kapp to be "a super person", one "destined for greatness", one of the three most exceptional people in football (Tr. 986, 1035). While Kapp's contract was the richest for any professional football player in the history of professional football (Tr. 1015), Sullivan publicly stated in July 1971, a month after NFL expelled Kapp:

> "I don't think he was over-compensated. I think what he did for the image of the club, what he did in the tremendous leadership he's given, makes him worth what he's getting. I'll make the prediction now that some day Joe Kapp will become one of the great coaches in professional football history. I think he's another Lombardi. I can't say enough for what Joe Kapp does to everyone who meets him." (Tr. 996)

supposed facts to be so, they are irrelevant. The stark fact here is that Kapp was damaged *by being barred from football* in 1971. Stripped of smooth phrasing, the defense is that one cannot recover for a boycott fastened on him for refusal to enter into an illegal contract and for thus refusing to make himself a party to an illegal combination if the illegal rules embodied in the contract had not injured him in the past or if a jury should speculate that the rules would not injure him in the future. The grotesque anomaly of the decision below is its holding that one *is required* to sign an illegal contract and thereby join an illegal combination and cannot recover for the damages deliberately inflicted on him because he will not do so, although if he had, thereby making himself a violator of the Sherman Act (*Albrecht v. Herald Co.* 390 U.S. 145 (1968)), nevertheless under *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), following *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964), he could recover for injury sustained from joining in the combination. *Perma Life* and *Simpson* hold that one is not precluded from recovering because he subscribes to an antitrust conspiracy. The decision below perverts this into a requirement that he subscribe to it. This is antitrust law gone berserk.

NFL's discussion also concedes the presence of the third question tendered by the petition:

> 3. May an industry custom or usage which violates the Sherman Act be used to read into a contract, otherwise complete, an implied condition that the contract will not be effective until embodied in a contract form which violates the Sherman Act? May an industry practice, imposed by one group upon another by conspiratorial conduct illegal under the Sherman Act, ever create a "custom or usage" having any legal effect?

NFL's contention that there was not a contract, it admits, is that it was the intention of the parties that the "memos were to be

incorporated into the Standard Player Contract", and that "intention" is a question for the jury (R. B. 11). But, as NFL's discussion further concedes, the court "permitted the jury to consider" whether there was a custom and usage for players to sign a Standard Players Contract form. It is an elementary rule that where one of the theories on which a case is submitted to a jury is incorrect, the verdict may not be sustained on an assumption that it may have been based on a correct theory. *Sunkist v. Winckler & Smith Co.*, 370 U.S. 19, 20, 21 (1962).

There are other statements in NFL's brief to which we give brief correction, perhaps unnecessarily.

NFL asserts (R.B. 6) that modifications from the Standard Form were allowed, omitting to note that modification of the provision that the player was bound by the NFL Constitution and By-Laws, which incorporated the illegal rules, was never tolerated. An offer to sign the standard contract if these provisions were deleted *was made* on behalf of Kapp and was rejected by NFL's counsel, who wrote (Tr. 2620):

> "Such a suggestion, of course, is worthless and in itself is a complete emasculation of the players contract as well as a refusal to accept the authority of the Commissioner and the provisions of the Constitution and By-Laws.
>
> "Such a suggestion could not be accepted by the club or the league, otherwise the entire relationship of players versus owners would be completely destroyed."

NFL intimates that Kapp did not tell the NFL Commissioner why he would not sign (R.B. 3). NFL knew full well why. Commissioner Rozelle telephoned Kapp and was told to discuss the matter with Kapp's attorney. NFL's counsel then discussed the matter with Kapp's counsel who told him that the reason why Kapp would not sign was that the Standard Players Contract form incorporated provisions of the NFL Constitution and By-Laws which were illegal (Tr. 1259-60). NFL counsel replied that

Kapp *had* to sign the standard contract or would remain out of football (Tr. 2600, 1261).

NFL notes that the trial court's pre-trial order defined as an issue to be tried the impact on Kapp, if any, of the illegal combination. So it did, and correctly so as to *other* claims of impact antedating the boycott, but so far as this pre-trial order let the jury hold that being boycotted out of football was not impact, it was the first enunciation of the error that pervaded the trial and appeal. Kapp never waived that error. Far from Kapp's position in this litigation having "varied" (R.B. 14), it has been constant, starting with the complaint (R. 22). Accompanying Kapp's motion for summary judgment (April 30, 1974) was a proposed order specifying that the trial relative to the events of 1971 was to be solely to determine the amount of damages (R. 3033). Kapp's constant position appeared again in the proposed order submitted by him upon the decision granting the motion.[7]

CONCLUSION

No more than Lady MacBeth's cry "Out damned spot! Out, I say" could remove the stain, can manipulation of words by NFL obscure propositions of law upon which the decision below rests, and those propositions are a corruption of important antitrust

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7. That draft, submitted December 27, 1974, contained this (R. 3044):
"(d) On May 28, 1971, because Kapp would not sign a Standard Player Contract, defendants barred Kapp from playing professional football and effective July 15, 1971, ejected him from doing so and continued thereafter to bar and prevent him from doing so as long as he declined to sign a Standard Player Contract and thereby deprived Kapp of the compensation stated in his Memo Agreement dated October 6, 1970, with the Patriots and which the Patriots would have paid him if he had succumbed to the demand that he sign a Standard Player Contract, and further deprived Kapp of the salaries and earnings he could reasonably expect to receive as a professional football player during his expectancy as a football player in a freely competitive market, and of pension rights."

principle. Summary reversal as well as grant of the petition is warranted.

We respectfully submit that the petition should be granted.

Dated: San Francisco, California, March 22, 1979.

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